



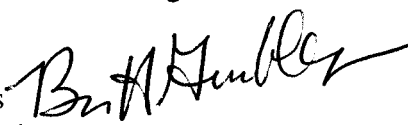
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 20 2004

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Section 1464(d) of the Safe Drinking Water Act and Lead in School Drinking Water

FROM: Benjamin H. Grumbles 
Acting Assistant Administrator

TO: Regional Administrators

Within the past month, EPA has received several questions regarding the applicability of Section 1464(d) of the Safe Drinking Water Act (SDWA), which addresses testing and other efforts relating to lead in school drinking water. The questions have been raised in response to recent reports of elevated lead levels in school drinking water in the Seattle, WA school district and other communities throughout the country. In 1996, a court decision in the U.S. Fifth Circuit of Appeals held that provisions of 1464(d) were unconstitutional. Based on its review of the case, EPA has determined that states are not required to carry out the program specified in Section 1464(d).

I want to emphasize that the Court's decision does not preclude states from carrying out such programs. We believe it is important to test for lead in schools and daycare facilities, as young children are the most vulnerable subpopulation. EPA strongly encourages states or local communities, as appropriate, to carry out testing programs for lead in school drinking water, and the Office of Water has begun several efforts to support these voluntary activities. I encourage your staff to work with me on these efforts.

Background

In 1988, Congress passed the Lead Contamination Control Act, which amended the SDWA to add several provisions addressing lead in school drinking water. Section 1464 (d) of the Act included three requirements related to establishment and implementation of state programs to test for, and remedy, lead contamination in schools.

1464 (d) Remedial Action Program –

(1) Testing and remedying lead contamination - Within 9 months after October 31, 1988, each State shall establish a program, consistent with this section, to assist local educational agencies in testing for, and remedying, lead contamination in drinking water coolers and from other sources of lead contamination at schools under the jurisdiction of such agencies.

(2) Public Availability - A copy of the results of any testing under paragraph (1) shall be available in the administrative offices of the local educational agency for inspection by the public, including teachers, other school personnel, and parents. The local educational agency shall notify parent, teacher, and employee organizations of the availability of such testing results.

(3) Coolers - In the case of drinking water coolers, such program shall include measures for the reduction or elimination of lead contamination from those water coolers which are not lead free and which are located in schools. Such measures shall be adequate to ensure that within 15 months after October 31, 1988 all such water coolers in schools under the jurisdiction of such agencies are repaired, replaced, permanently removed, or rendered inoperable unless the cooler is tested and found (within the limits of testing accuracy) not to contribute to lead in drinking water.

In 1996, the Fifth Circuit Court of Appeals decided *ACORN v. Edwards*, 81 F.3d 1387 (5th Cir. 1996), an appeal of a case in which the Association of Community Organizations for Reform Now (ACORN) had sued the State of Louisiana for failing to carry out several provisions related to section 1464 of the SDWA¹. While the lower court's ruling dismissed ACORN's claims as moot, it ordered the State of Louisiana to pay attorney's fees and expenses to ACORN. The State appealed the decision, arguing, in part, that the provisions it had been charged with not meeting were unconstitutional. In its decision, the Fifth Circuit held that provisions in section 1464 were unconstitutional under the Tenth Amendment to the U.S. Constitution because they directly compelled the state to enact and enforce a federal regulatory program and provided no options for the State to decline the program. The Court reversed the lower court's decision which required the State to pay ACORN's attorney fees.

Relevance of the Decision to Enforcement of 1464(d)

While the decision technically only applies in the Fifth Circuit, the basis of the Fifth Circuit's ruling is still valid under controlling Supreme Court precedent. That precedent, in essence, states that Congress cannot "commandeer" a State by requiring it to carry out a federal program. *New York v. United States*, 505 U.S. 144 (1992). Such legislation is invalid under the Tenth Amendment to the U.S. Constitution. Since SDWA Section 1464(d) required a State to carry out a program to test and remediate lead contaminated water coolers in schools, a duty enforceable by citizen suit, it violated the Tenth Amendment.

The Court specifically addressed 1464(d)(1) and 1464(d)(3) as being unconstitutional. The ACORN decision explicitly did not address the second requirement regarding public availability of testing results (1464(d)(2)). This second requirement, however, might not be

¹Acorn v. Edwards can be found at <http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=5th&navby=case&no=9430714cv0>

severable from the first and third requirements, since it explicitly refers to testing conducted under a state program established under 1464(d)(1). The viability of this provision has not yet been determined by the courts.

Some have asked if EPA has enforcement authority to carry out the provisions under section 1464(d) or otherwise require states and/or systems to make the results of any testing conducted available to the public. The SDWA does not provide EPA with direct enforcement authority with respect to 1464(d) because this provision is not included in the list of "applicable requirements" under Section 1414 (EPA's enforcement authority). However, in appropriate cases, the Agency could consider using its authority under Section 1431 (EPA's emergency authority) or other authorities to require testing and making the results of testing public.

EPA Policy of Encouraging State and Local Efforts

Notwithstanding the ACORN decision, as a matter of public health policy, EPA encourages States and local school districts to test for lead in school drinking water, inform the public of results, and remove lead contaminated coolers from service. EPA will continue to encourage these types of programs and provide assistance, including technical guidance, to help states and schools carry out programs. EPA also encourages that such programs be designed within a framework that works to reduce children's risk of exposure to lead from all potential sources, including paint, dust and soil.

cc. Regional Water Division Directors
Regional Counsels
Regional Enforcement Division Directors
Susan Lepow, Office of General Counsel
William Sanders, Office of Children's Health Protection
Charles Auer, Office of Pollution Prevention and Toxics
Walker Smith, Office of Enforcement and Compliance Assessment
James Taft, Association of State Drinking Water Administrators